No. 77-1177

In the

Supreme Court of the United States

OCTOBER TERM, 1977

AUBREY SCOTT,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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IN THE

SUPREME COURT OF THE UNITED STATES

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No.

AUBREY SCOTT,

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vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

To: *The Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States*

Petitioner, Aubrey Scott, prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Illinois entered on October 5, 1977, affirming the decision of the Appellate Court of Illinois, First District.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois affirming the decision of the Appellate Court of Illinois is reported at 68 Ill. 2d 269. It is reproduced in the Appendix to this Petition at A. 1a.

The opinion of the Appellate Court of Illinois, First District entered on February 26, 1976, affirming petitioner's conviction, is reported at 36 Ill. App. 3d 304, 343 N.E. 2d 517. It is reproduced in the Appendix to this Petition at A. 6a.

The record of petitioner's bench trial in the Circuit Court of Cook County, Illinois, First District, dated January 31, 1972, is reproduced in the Appendix to this Petition at A. 22a.

JURISDICTION

The decision of the Supreme Court of Illinois was entered on October 5, 1977. The Petition for Rehearing was denied on November 23, 1977. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

1) Whether the sixth and fourteenth amendments to the United States Constitution guarantee the right to counsel when a defendant is charged with an offense punishable under state law by imprisonment, regardless of whether the defendant is in fact imprisoned?

2) Whether the trial of Petitioner Scott without the assistance of counsel was so unfair as to deny due process of law?

CONSTITUTIONAL PROVISIONS

Constitution of the United States, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Constitution of the United States, Amendment XIV, Section 1:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Aubrey Scott was arrested on January 19, 1972, for shoplifting a sample case and an address book worth $13.68 at a F.W. Woolworth store in Chicago. Scott was charged with petty theft under Ill. Rev. Stat. ch. 38 § 16-1(A)(1) (1972), which carries a possible sentence of a fine not to exceed $500 or imprisonment not to exceed one year, or both.

On January 31, 1972, Scott, without benefit of counsel, made his first scheduled court appearance. A misunderstanding by Scott of the court's question as to his readiness for trial resulted in Scott's immediate bench trial on that day. (A. 7a-8a, 22a) Scott was not served a copy of the complaint at his arraignment, nor was he advised of what items he was accused of taking. He was also not advised of the relevance of his indigency to his right to appointed counsel, so that there is no indication of his indigent status at trial* At no time during the entire

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* However, given Petitioner's affidavit of indigency in the Appellate Court and the State's agreement as to his indigency, both courts below considered petitioner's indigency to be established. (A. 1a-2a, 10a-11a).

proceeding was Scott ever advised that he had a right to counsel and, if indigent, a right to appointed counsel. (A. 1a).

During the trial, the State's only witness was a store security guard, who testified that he saw Scott leave the store without paying for the articles. (A. 23a-24a). Scott then testified in his own behalf that he had been accused of shoplifting while still inside the store, and that he had been merely searching for the sales clerk. (A. 24a). Scott called no witnesses; the court never advised Scott that he had a right to do so.

Dissatisfied with the presentation of the facts after the defendant had finished his testimony, the court asked the prosecutor to ask more questions. (A. 25a) The prosecutor, however, refused on the grounds that the State had made its case. The court then proceeded to interrogate the defendant on its own. (A. 25a) Scott was then found guilty, and although the prosecutor recommended probation, he was fined $50. (A. 26a). On February 29, 1972, Scott filed timely notice of appeal.

The Appellate Court of Illinois found that the reach of the sixth amendment right to counsel is limited to defendants who are in fact imprisoned, and therefore Scott had no constitutional right to an appointed trial counsel. (A. 13a-14a) The Appellate Court also rejected Scott's statutory argument that he had a right to appointed counsel under Ill. Rev. Stat. ch. 38 § 113-3(b), which requires the court to appoint the Public Defender for indigents desiring counsel "in all cases, except where the penalty is a fine only. . . ." The Supreme Court affirmed on both grounds.

REASONS FOR GRANTING THE WRIT

I. THE QUESTION LEFT OPEN IN ARGERSINGER V. HAMLIN, 407 U.S. 25 (1972), WHETHER THE SIXTH AMENDMENT RIGHT TO COUNSEL APPLIES TO DEFENDANTS FINED BUT NOT IMPRISONED FOR CRIMES PUNISHABLE BY IMPRISONMENT, HAS CAUSED EXTENSIVE DIVISION AND CONFUSION AMONG FEDERAL AND STATE COURTS.

The Fifth Circuit Court of Appeals has spoken most clearly and frequently on the scope of the sixth amendment right to counsel. It has concluded that the right must apply in all cases in which imprisonment is a possible sentence. *Potts* v. *Estelle*, 529 F.2d 450 (5th Cir. 1976) cert. denied 96 S.Ct. 646 (1977); *Thomas* v. *Savage*, 513 F.2d 536 (5th Cir. 1975). The Second Circuit has not ruled directly on the issue raised in the instant case, but has supported in principle the right to counsel in cases where the defendant faces the prospect of imprisonment. *In re Di Bella*, 518 F.2d 955, 959 (2d Cir. 1975) (right to appointed counsel in contempt proceedings where defendant is "faced with the prospect of imprisonment").

The Eighth Circuit directly conflicts with the Fifth Circuit by limiting the scope of the sixth amendment right to counsel to cases where the defendant is in fact imprisoned. *United States* v. *White*, 529 F.2d 1390 (8th Cir. 1976) (90 day suspended sentence vacated because waiver of counsel not clearly shown, but $50 fine affirmed). Opinions of the Fourth, Ninth and Tenth Circuits also reveal conflicts in principle with the Fifth and Second Circuits' position on the scope of the right to counsel. *Morgan* v. *Juvenile and Domestic Relations Court*, 491 F.2d 456 (4th Cir. 1974) (habeas corpus relief denied to defendant who had already served prison sentence due to uncounseled conviction); *but see, Richmond Black Po-*

lice Officers Assoc. v. *City of Richmond, Va.*, 548 F.2d 123, 128-129 (4th Cir. 1977) (court stated that "where a criminal contempt proceeding carries as a possible penalty the risk of imprisonment then the person so charged is guaranteed the right to counsel. . . ." Although it was held that the district court erred in refusing to grant counsel "at the outset of the proceedings when he potentially faced a risk of imprisonment," the error was deemed harmless because defendant was fined and not imprisoned); *Henkel* v. *Bradshaw*, 483 F.2d 1386 (9th Cir. 1973) (declaratory judgment that defendant has right to counsel in threatened contempt proceeding vacated as premature and undue intrusion on state court's authority); *Sweeton* v. *Sneddon*, 463 F.2d 713, 716 (10th Cir. 1972) (injunction against trial court trying defendant for a misdemeanor without counsel vacated in part because not strictly required by *Argersinger*). The First Circuit has taken an equivocal stand on the scope of the right to counsel under *Argersinger*. *United States* v. *Sawaya*, 486 F.2d 890, 892, n.2 (1st Cir. 1973) ("Despite the very narrow language chosen by the Court, *Argersinger* could also be read as extending the right to assistance of counsel at trial whenever the loss of liberty is a possibility.").

Although there are few federal district court opinions directly on point, the ones that are most relevant to the instant issue support a potential imprisonment, rather than an imprisonment-in-fact, standard. *Tate* v. *Kassulke*, 409 F. Supp. 651, 658 (W.D. Ky. 1976) ("since *Argersinger* every person charged with a misdemeanor which may result in possible imprisonment is entitled to the services of an attorney.") *Tyson* v. *New York City Housing Authority*, 369 F.Supp. 513, 521 (S.D.N.Y. 1974) (*Argersinger* requires appointment of counsel in criminal

actions where there is a possibility of imprisonment); *Geehring* v. *Municipal Court of Girard*, 357 F.Supp. 79, 82 (N.D. Ohio 1973) ("justice and fairness demand the appointment of counsel to any person found to be indigent if a possibility exists that said person might lose his liberty as a result of his being prosecuted."); *Gilliard* v. *Carson*, 348 F.Supp. 757 (M.D. Fla. 1972) (prosecutors enjoined from prosecuting indigent defendants for any offense punishable by imprisonment unless defendants are represented by counsel or make a valid waiver of counsel); *Hernandez* v. *Craven*, 350 F.Supp. 929, 936-37 (C.D. Cal. 1972) (the sixth amendment right to assistance of counsel extends to petty offenses where imprisonment is possible).

Courts in Wisconsin, Kentucky, Massachusetts, Michigan, New York, Oregon, Texas, and Washington have supported the view that the threat of imprisonment constitutionally requires the appointment of counsel. *State ex rel. Winnie* v. *Harris*, 75 Wis. 2d 547, 556, 249 N.W.2d 791, 796 (1977) ("(W)henever a defendant is charged with a crime, the penalty for which includes the requirement or option of incarceration, he must be advised of his right to counsel and further advised that if he is indigent counsel will be furnished to him at public expense unless he knowingly and intelligently waives such right to counsel."); *Jenkins* v. *Commonwealth*, 491 S.W.2d 636, 637 (Ky. App. 1973) ("It is well established that the state must furnish counsel for indigent defendants in cases which may result in imprisonment."); *Commonwealth* v. *Barrett*, 322 N.E.2d 89, 91 (Mass. App. 1976) (prior assault and battery convictions obtained without counsel and punished only by fines could not be introduced to impeach defendant); *Artibee* v. *Cheboygan Circuit Judges*, 243 N.W.2d 248, 249, 397 Mich. 54, 57 (1976) (due process

requires appointment of counsel for indigent defendants in paternity prosecutions because "the interests of the individuals affected are substantial, and the nature of the proceedings is sufficiently complex so as to require counsel to insure a fair trial."); *People* v. *Harris,* 45 Mich. App. 217, 219, 206 N.W.2d 478, 480 (1973) ("defendant has the right to appointment of counsel at trial, even though he is charged only with a misdemeanor offense, conviction of which could subject him to imprisonment."); *In re Smiley,* 36 N.Y.2d 433, 437, 330 N.E.2d 53, 55, 369 N.Y.S.2d 87, 90 (1975) ("The underlying principle (of *Gideon* v. *Wainwright*) is that when the State or Government proceeds against the individual with risk of loss of liberty or grievous forfeiture, the right to counsel and due process of law carries with it the provision of counsel if the individual charged is unable to provide it for himself."); *People* v. *Weinstock,* 363 N.Y.S.2d 878, 879, 80 Misc. 2d 510, 511 (1974) ("hereinafter the local criminal courts are on notice that defendants charged with traffic violations and subject to possible imprisonment, must be advised of their right to counsel and to have counsel assigned where the defendant is financially unable to obtain same. (See *Argersinger* v. *Hamlin* (cite)."); *Brown* v. *Multnomah County District Court,* 29 Ore. App. 917, 566 P.2d 522, 525 (1977) ("An accused has a right to counsel under the Sixth Amendment . . . in all criminal prosecutions where loss of liberty is a potential sanction. *Argersinger* . . ."); *Trevino* v. *State,* 555 S.W.2d 750, 751 (Tex. Crim. App. 1977) ("It is well settled that criminal defendants in misdemeanor cases are entitled to counsel if there exists a possibility that imprisonment may be imposed. See *Argersinger* . . .") *Tetro* v. *Tetro,* 86 Wash. 2d 252, 254, 544 P.2d 17, 19 (1975) ("It was this threat (of imprisonment) that the court in *Argersinger* v. *Hamlin* (cite) held was determinative of the right to counsel in criminal cases.")

Courts of five states besides Illinois have refused to appoint counsel for defendants who are not actually imprisoned: *Rollins* v. *State,* 299 So.2d 586, 588 (Fla. 1974) *cert. denied* 419 U.S. 1009; *Mahler* v. *Birnbaum,* 95 Idaho 14, 15, 501 P.2d 282, 283 (1972); *Nelson* v. *Tullos,* 323 So.2d 539, 545-6 (Miss. 1975); *State* v. *Henderson,* 549 S.W.2d 566, 568 (Mo. App. 1977); *State* v. *Ross,* 36 Ohio App. 2d 185, 304 N.E.2d 396, 407 (1973), *appeal dismissed* 415 U.S. 904 (1974), *but see In re Fisher,* 39 Ohio St. 2d 71, 82, 313 N.E.2d 851, 858 (1974), in which the court held that all persons threatened with a loss of liberty in civil commitment proceedings have a fourteenth amendment right to counsel.

Thus, the Court's determination of whether or not the sixth amendment right to counsel extends to defendants who are fined but not imprisoned for crimes punishable by imprisonment is critical not only because federal and state courts are thoroughly divided on the question, but also because these courts base their disparate conclusions on the same authority, *Argersinger* v. *Hamlin.* The confusion will, of course, persist until the Court chooses to address this question left unresolved in *Argersinger.*

II. THE ILLINOIS SUPREME COURT'S APPLICATION OF THE SIXTH AMENDMENT RIGHT TO COUNSEL ONLY TO IMPRISONED DEFENDANTS CANNOT BE RECONCILED WITH THE RATIONALE OF BOTH ARGERSINGER AND THIS COURT'S SUBSEQUENT RIGHT TO COUNSEL DECISIONS.

Mr. Justice Powell, concurring in *Argersinger,* observed that neither logic nor sixth amendment precedent would

support a limitation of the right to counsel to imprisoned defendants.* 407 U.S. at 51-52. The conflict between such a limitation and the principles underlying the sixth amendment has become even sharper in light of the Court's more recent sixth amendment interpretations. In two such cases the Court explained that the sixth amendment requires counsel in criminal trials as opposed to proceedings which are less formal, *Gagnon* v. *Scarpelli,* 411 U.S. 778, 789 (1973), or non-adversary, *Middendorf* v. *Henry,* 425 U.S. 25, 40-41 (1976), because the invariable attributes of the criminal trial process make a fair trial impossible without the assistance of counsel. Indeed, in *Farretta* v. *California,* 422 U.S. 806 (1975), in which the Majority agreed with the thesis "that the help of a lawyer is essential to assure the defendant a fair trial," 422 U.S. at 832-833, three Justices of the Court believed counsel to be so indispensible that a defendant has no constitutional right to be tried without counsel. The Chief Justice emphasized the absolute necessity of counsel for a fair trial in observing "that in all but an extraordinary small number of cases an accused will lose whatever defense he may have if he undertakes to conduct the trial himself." 422 U.S. at 838 (dissenting).

If counsel is thus essential for a fair trial, the imprisonment-in-fact limitation of the right to counsel can be justified only if an uncounseled, and therefore unfair, criminal trial is a *de minimis* due process violation whenever no imprisonment results. However, as Mr. Justice

* The Majority in *Argersinger* did not dispute Mr. Justice Powell's judgment as to the illogic and lack of constitutional support for an imprisonment-in-fact limitation on the right to counsel, but responded instead, that the Court was not considering the application of the sixth amendment where loss of liberty is not involved. 407 U.S. at 37.

Powell has pointed out in regard to the coverage of the sixth amendment, there is no basis in the Constitution for distinguishing between deprivations of liberty and property and there is no basis in reality for assuming that "non-jail" petty offense convictions will result in less serious consequences than brief jail sentences. 407 U.S. at 51-52. *See also Mayer* v. *City of Chicago,* 404 U.S. 189, 197 (1971).

The Illinois Supreme Court below did not justify its limitation of the right to counsel to imprisoned defendants on the ground either that a defendant can have a fair criminal trial without the assistance of counsel, or that Aubrey Scott in fact received a fair trial. Neither did the court maintain that the consequences of a non-jail misdemeanor conviction are generally *de minimis* or that the consequences of Aubrey Scott's petty theft conviction were in fact *de minimis.* The court, however, did explain its limitation of the right to counsel to imprisonment-in-fact cases by noting that the Court in *Argersinger* had extended the right only to cases of actual imprisonment and that it was "not inclined to extend *Argersinger* . . ." (A. 3a) Since the principle of *Argersinger,* as well as of this Court's other right to counsel decisions, in the words of Mr. Justice Powell, "foreshadows the adoption of a broad prophylactic rule applicable to all petty offenders," *Argersinger,* 407 U.S. at 52 (concurring), the court below erred in erecting *Argersinger* as a conclusive barrier to any further extension of the right to counsel. As illustrated by the one-sided trial below, the unfair burdens faced by an uncounseled criminal defendant require that the historical evolution of the concept of right to counsel not end with the imprisoned defendant in *Argersinger,* but encompass as well those defendants charged with crimes serious enough to carry the threat of imprisonment.

III. ARGERSINGER'S REQUIREMENT OF A PRE-TRIAL DETERMINATION OF A DEFENDANT'S PROBABLE SENTENCE RESULTS IN ARBITRARY, UNCONSTITUTIONAL JUDICIAL DECISION MAKING, THE FRUSTRATION OF LEGISLATIVE INTENT AND CONFUSION IN THE ADMINISTRATION OF CRIMINAL JUSTICE.

The trial judge's determination of whether or not he is likely to impose a prison sentence upon conviction and therefore whether he must appoint counsel is of critical importance to the defendant because, on the one hand, a decision not to appoint counsel will, as it did in the instant case, increase the likelihood of conviction, while, on the other hand, a decision to appoint counsel will increase the likelihood of a prison sentence after conviction since the judge has already made up his mind that imprisonment is the most likely penalty. *See State ex rel. Winnie* v. *Harris,* 75 Wis.2d 547, 556, 249 N.W.2d 791, 795 (1977) *infra.* 13. In non-jury cases this crucial pre-trial determination of sentence must be arbitrary because it is inevitably based upon an inadequate factual record. Since the trier of fact before trial cannot properly receive information about the defendant beyond the allegations of the complaint or indictment, his determination of the probable sentence will constitute little more than uninformed guesswork. Due process requires that the determination of a defendant's critical right to counsel be based upon more reliable, accurate grounds than a judge's guess as to the type of evidence that will be adduced at trial.

The State has no interest in preserving the pre-trial sentencing determination required by *Argersinger* since it abrogates the intent of state legislatures that the full range of sentencing alternatives, including imprisonment, be available after the facts of a crime have been brought

to light and after the facts in aggravation and mitigation have been heard. On this ground the Supreme Courts of Washington and Wisconsin have denied the right of a judge to engage in predictive sentencing determinations:

> We reject the idea that a court can determine in advance of trial what the punishment will be. Such a procedure would violate every concept of due process . . . . The power to decide what acts shall be criminal, to define crimes, and to provide what the penalty shall be is legislative. . . . It would be wholly wrong for a court or a judge to determine in advance to abrogate a part of a statute or ordinance—either in a specific case or in a whole class of cases.

McInturf v. *Horton,* 85 Wash. 2d 704, 706, 538 P.2d 499, 500 (1975). *See also State ex rel. Winnie* v. *Harris,* 75 Wis. 2d 547, 556, 249 N.W.2d 791, 795-6 (1977), where the court noted:

> "Under this individualized prediction standard, the mere fact that the right to counsel has been gone into strongly indicates that the judge is already considering the possibility of jail for a particular defendant even though he has not heard the evidence. On the other hand, this system would also result in people not being incarcerated who should be because of an erroneous evaluation of sentence limitations prior to hearing the evidence in the case."

Finally, the discretion *Argersinger* gives judges to deny counsel and the questionable effect of such denials on the validity of the underlying convictions has created confusion and division among courts in determining the permissible use of uncounseled convictions in subsequent criminal proceedings. Cases disallowing the use of such convictions in subsequent prosecutions which may result in imprisonment are: *Twyman* v. *State of Oklahoma,* 560 F.2d 422, 423 (10th Cir. 1977); *Wilcox* v. *State,* 269 So.2d

420, 421 (Fla. App. 1972); *Griffin* v. *State,* 142 Ga. App. 362, 235 S.E.2d 724 (1977); *State* v. *Kirby,* 289 N.E.2d 406, 407 (Ohio Com. Pl. 1972); *Walker* v. *State,* 486 S.W. 2d 330, 331 (Tex. Crim. App. 1972). Cases in which prior uncounseled convictions were allowed to be introduced in subsequent proceedings leading to imprisonment are: *United States* v. *Allen,* 556 F.2d 720 (4th Cir. 1977) *State* v. *McGrew,* 127 N.J. Super. 327, 317 A.2d 390 (1974); *Aldrighetti* v. *State,* 507 S.W. 2d 770 (Tex. Crim. App. 1974); *Wood* v. *Superintendent,* 355 F. Supp. 338, 343 n. 5 (E.D. Va. 1973); *State* v. *Giddings,* 216 Kan. 14, 531 P.2d 445 (1975); *People* v. *Heal,* 20 Ill. App. 3d 965, 313 N.E.2d 670, 672 (1974).

In sum, a determination by the Court that all defendants charged with crimes punishable by imprisonment have a right to counsel would avoid the due process problems inherent in having the right to counsel depend upon judicial guess-work as to the most likely sentence. It would avoid contravening the intent of every state legislature that the full range of sentencing alternatives, including imprisonment, be considered in light of the facts adduced at trial and sentencing hearing. Finally, it would avoid the present uncertainty as to the use of prior uncounseled convictions in subsequent proceedings.

CONCLUSION

For the foregoing reasons the petitioner respectfully submits that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

In The Supreme Court of the State of Illinois.

THE PEOPLE OF THE STATE OF ILLINOIS,
Appellee, v. AUBREY SCOTT, Appellant.

Mr. Justice Moran delivered the opinion of the court:

Following a bench trial in the circuit court of Cook County, defendant, Aubrey Scott, was convicted of theft and fined $50. The appellate court affirmed (36 Ill. App. 3d 304), and we granted defendant leave to appeal.

On January 19, 1972, defendant was apprehended for shoplifting merchandise valued under $150, and was charged with theft pursuant to section 16-1 of the Criminal Code of 1961, which provided:

> "A person first convicted of theft of property not from the person and not exceeding $150 in value shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both." Ill. Rev. Stat. 1971, ch. 38, par. 16-1.

Defendant was released on bail pending his first appearance. On the scheduled date, he appeared in court without counsel. The record indicates that the court informed the defendant of the charge and asked him if he was ready for trial. Defendant responded that he was ready for trial, the court directed the clerk to again read the charges, and defendant pleaded not guilty. A jury trial was waived, and a bench trial followed resulting in defendant's conviction and fine. At no time during the proceeding was defendant advised of a right to have assistance of counsel, or, if indigent, the right to have counsel appointed.

The record indicates that defendant was an indigent at the time of his initial appeal, but there is no indica-

tion of his indigency at trial. We will, however, assume for the purpose of this appeal that defendant was indigent at the time of his trial.

Defendant initially contends that all persons charged with a criminal offense which, upon conviction, carries the potential for imprisonment are constitutionally entitled, if indigent, to have counsel appointed, even if the conviction results in only the levying of a fine. Defendant, however, readily concedes that the United States Supreme Court has not to date extended the right to counsel this far.

In *Argersinger* v. *Hamlin* (1972), 407 U.S. 25, 32 L. Ed. 2d 530, 92 S. Ct. 2006, the Supreme Court extended the right to counsel to all criminal prosecutions which resulted in actual imprisonment. The *Argersinger* court stated:

> "We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.
>
> * * *
>
> Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel. He will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts." 407 U.S. 25, 37, 40, 32 L. Ed. 2d 530, 538, 540, 92 S. Ct. 2006, 2012, 2014. Accord, *People* v. *Morrissey* (1972), 52 Ill. 2d 418; *People* v. *Coleman* (1972), 52 Ill. 2d 470.

Recently, this court ruled that a defendant is not entitled to the appointment of counsel under either the Federal or Illinois constitutions where he or she is charged with an ordinance violation which provides for a fine only upon conviction. (*City of Danville* v. *Clark* (1976),

63 Ill. 2d 408, 412-13, *cert denied* (1976), 429 U.S. 899, 50 L. Ed. 2d 184, 97 S. Ct. 266.) We are unpersuaded by defendant's argument that the mere possibility of incarceration upon conviction should trigger a defendant's constitutional right to counsel, for there exists no possibility of incarceration if counsel was not properly waived. We are not inclined to extend *Argersinger* and *Morrissey* merely because a defendant is charged with a statutory offense which provides for various sentencing alternatives upon conviction. See *Nelson* v. *Tullos* (Miss. 1975), 323 So. 2d 539; *Mahler* v. *Birnbaum* (1972), 95 Idaho 14, 501 P.2d 282.

Defendant next contends that he was statutorily entitled to the appointment of counsel pursuant to either section 109—1(b)(2) or section 113—3(b) of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1971, ch. 38, pars. 109—1(b)(2), 113—3(b)). Section 109—1(b)(2), set forth in the article entitled "Preliminary Examination," provides that when a person is arrested without a warrant, he shall be brought before a court and

> "(b) The judge shall:
>
> * * *
>
> (2) Advise the defendant of his right to counsel and if indigent shall appoint a public defender or licensed attorney at law of this State to represent him in accordance with the provisions of Section 113—3 of this Code." (Ill. Rev. Stat. 1971, ch. 38, par. 109—1(b)(2).)

The State argues that the record in this case indicates no preliminary hearing was held, and, unless a preliminary hearing was conducted, section 109 is inapplicable. The State's contention need not be reached for, even if section 109 were applicable, it would not assist the defendant here. As provided above, the statutory right to appointed counsel pursuant to section 109—1(b)(2) is dependent on the provisions of section 113-3 of the Code.

Section 113—3(b) provides, *inter alia*:

> "In all cases, except where the penalty is a fine only, if the court determines that the defendant is indigent and desires counsel, the Public Defender shall be appointed as counsel. ***" (Ill. Rev. Stat. 1971, ch. 38, par. 113—3(b).)

Defendant argues that the term "penalty" used in the above section refers to the penalties set forth in the statute under which the criminal defendant is charged. Under his interpretation, indigent defendants are entitled to appointed counsel in all cases except where the prescribed statutory penalty is a fine only. We disagree. "Penalty" as used in this section refers to the punishment imposed against the defendant by the court upon conviction. Where the court imposes a penalty of a fine only, a defendant is not statutorily entitled to appointed counsel. Consequently, defendant was not entitled to counsel pursuant to either section 109-1(b)(2) or 113-3(b).

Defendant finally asserts that, even if he is not entitled to the appointment of counsel, section 109-1(b)(2) required the court to advise him of the right to secure counsel and to have counsel present to assist him.

Again, assuming section 109 to be applicable to this case, we do not believe it supports the defendant's contention. Although we recognize that all defendants are entitled to have counsel assist them in criminal proceedings, section 109-1(b)(2) does not require the court to advise them of this right in all cases. Since the defendant was penalized only by fine, he was neither constitutionally nor statutorily entitled to have counsel present. The court was, therefore, under no obligation to obtain a waiver before proceeding to trial without counsel and, hence, was under no obligation to advise the defendant of his right to counsel.

Accordingly, the judgment of the appellate court is affirmed.

Judgment affirmed.

Mr. Justice Goldenhersh, dissenting:

I dissent. It is clear under the holding of the Supreme Court in *Argersinger* v. *Hamlin*, 407 U.S. 25, 32 L.Ed. 2d 530, 92 S. Ct. 2006, and our decisions in *People* v. *Morrissey*, 52 Ill. 2d 418, and *People* v. *Coleman*, 52 Ill. 2d 470, that a defendant has a right to counsel in any criminal prosecution which might result in actual imprisonment, and I agree with Judge Leighton's statement, in dissent, that the right "is so important that judges should not engage in nice calculations about when that right should be enjoyed" (36 Ill. App. 3d 304, 314). The majority quotes (slip opinion page 2) that portion of *Argersinger* which endows trial courts with a degree of prescience which I doubt exists, that is, that a judge, prior to hearing any evidence, "will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts" (407 U.S. 25, 40, 32 L. Ed. 2d 530, 540, 92 S. Ct. 2006, 2014). I have searched *Argersinger* in vain for the source of this knowledge prior to the time when a judge has heard evidence in the case.

The clear and explicit language of section 109-1(b)(2) of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1971, ch. 38, par. 109-1(b)(2)) requires that the judge shall advise a defendant of his right to counsel in accordance with the provisions of section 113-3 of the Code (Ill. Rev. Stat. 1971, ch. 38, par. 113-3). Section 113-3 provides, without drawing the distinction made by the majority, that every person charged with an offense shall be allowed counsel before pleading to the charge.

I must, of course, concede that because of the fortuitous circumstance that this defendant was not sentenced to a period of incarceration, *Argersinger* does not *per se* require reversal of the judgment. However, as has been pointed out in numerous decisions, in matters involving the constitutional rights of its citizens, Illinois is free to set higher standards than those imposed by the decisions of the Supreme Court. The General Assembly has

seen fit so to do. The adverse effect of failure to be provided with counsel is not limited to the possibility of incarceration. It may well be that had this defendant known of his right to counsel, and elected to have counsel, he might have been acquitted of the charge. The failure to advise him of his right to counsel requires that the judgment be reversed.

In The

APPELLATE COURT OF ILLINOIS

First District

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

vs.

AUBREY SCOTT,

Defendant-Appellant.

Appeal from the Circuit Court of Cook County.
Honorable Maurice W. Lee, *Presiding.*

Mr. Justice Hayes delivered the opinion of the court.

This is an appeal by defendant-appellant, Aubrey Scott (hereinafter defendant), from his conviction of petty theft for shoplifting, for which he was fined $50.00. He paid the fine and timely filed his notice of appeal. He had been arrested without a warrant at the scene of the incident. A few hours later, he had posted $100 in cash (10% of the pretrial bond of $1,000 prescribed by Supreme Court Rule), and had been freed from custody with a first court appearance scheduled for eleven days later. On the scheduled date he duly appeared in court, but he was without counsel. The court proceeding began as a preliminary hearing on the existence of probable cause to charge him with the offense. But, when he indicated to the court that he was then ready for trial,

the court ordered him arraigned, and he pleaded not guilty. After having been advised of his right to a jury trial, he waived a jury. His bench trial followed immediately and resulted in his conviction and sentence. At no time during the entire proceeding was he ever advised of any right to be represented by counsel. This is the issue which he presents as reversible error on this appeal.

In detail, the facts are as follows: On the evening of 19 January 1972, defendant, then 52 years old, was arrested by a Chicago Police Officer for "shoplifting" at the F.W. Woolworth Company's store at 211 South State Street, Chicago, Illinois, pursuant to the charge of a store security guard. Early the following morning, defendant posted the prescribed bond of $1,000 by depositing $100 in cash, and was released from custody with a first court appearance scheduled for 31 January 1972. The complaint, filed by the security guard on 21 January 1972 in the Municipal Department, First Municipal District of the Circuit Court of Cook County, Illinois, charged defendant with the theft, at the time and place mentioned above, of a sample case and an address book of the value of $150.00 or less (specifically, of the value of $13.68), which was the property of the Woolworth Company, with the intent thereby to deprive the said Company permanently of the use and benefit of the said property—all in violation of Ill. Rev. Stat. 1969, ch. 38, par. 16-1(a)(1).

On 31 January 1972, defendant appeared in open court as scheduled but without counsel. The court advised defendant that he was charged with the offense of theft. The court then inquired as to whether defendant was going to be ready for trial. Up to this point, the proceeding was clearly a preliminary hearing on the existence of probable cause to charge defendant with petty theft and, if so, to grant leave to complainant to file the complaint.

Defendant, however, understood the court to be asking whether he (defendant) was presently ready for trial,

and defendant said that he was. When the State answered ready, the court ordered defendant to be arraigned. The clerk first again informed defendant that he was charged with the offense of theft, and then inquired whether defendant was ready for trial, to which defendant answered he was. Called upon to plead to the charge, defendant pleaded not guilty and then orally waived a jury trial. His bench trial immediately proceeded. At no time during the entire proceeding was defendant ever advised that he had a right to counsel and, if indigent, a right to appointed counsel except where, in the latter event, the penalty upon conviction is a fine only.

The sole witness for the State was William Bray, the security guard at the Woolworth store. He testified that on 19 January 1972, he was on duty at the store; he saw defendant approach a sales girl and heard defendant ask the girl to unlock an attache case; the girl did so; defendant then walked around the store for about 15 or 20 minutes, carrying the case and holding a ten dollar bill in his hand; while defendant was walking around, he picked up an address book and put it in his pocket; defendant passed by sales girls as he walked around the store. The guard testified further that he (the guard) then walked out of the store onto State Street; a few minutes later, defendant walked out of the store onto State Street, still carrying the attache case; the time was about 6:00 P.M.; the witness identified himself and ordered defendant back into the store; defendant said the case belonged to him and there were a number of articles in the case which defendant said belonged to him and which defendant had put into the case before leaving the store. The witness identified People's Exhibit 1 as the case involved, and said that the case was the property of F.W. Woolworth Company and that it was priced for retail sale at $12.95. The State thereupon rested its case-in-chief.

Defendant testified in his own behalf as follows: He had placed articles of his own into the case to see whether they would fit, which they did. He walked around the

store carrying the case with his articles in it and looking for the sales girl who had given the case to him. The sales girl did not work behind the counter from which she had handed him the case, but rather stood near the counter. He is partially blind and he could not see the sales girl. Suddenly, Bray came into the store through the State Street door, grabbed him by the wrist, and said: "You are a shoplifter." Defendant replied that he was not; he had come to buy a case and was looking for the sales girl who had handed him the case for inspection. He showed Bray that he had money with which to buy it. After a second security guard had come up behind him and grabbed his hand, the police came and took him to jail.

The State declined any cross-examination, presented no rebuttal testimony, and rested its case. The court indicated that there were things it wished to know, so the prosecutor suggested that the court question defendant. The court first asked where defendant had been stopped, and noted that defendant had testified that he had been stopped in the store and had never gone out onto State Street. The court then asked how much money defendant had with him when he had been stopped, and whether defendant had offered any money to anyone. Defendant replied that he had almost $300.00 in his pocket and that he had the ten dollar bill in his hand to pay the sales girl that amount or whatever larger amount she might indicate.

At that point, the court said: "I don't believe you, sir. Finding of guilty. What do you [the prosecutor] have in aggravation?" The prosecutor stated that, in 1957, defendant had been convicted of petty larceny and had been sentenced to thirty days in the House of Correction and that this was defendant's most recent prior conviction. Defendant then noted that this conviction had occurred thirteen years before. (In fact, it must have occurred either 14 or 15 years before.) The prosecutor recommended probation, but the court fined defendant $50

without any costs. The fine was promptly paid out of the bond deposit. On 29 February 1972, defendant filed timely notice of this appeal.

The order entered by the trial court on 31 January 1972 in substance recited:

1) Now comes William Bray, presents his Complaint under oath, and moves the court that he be granted leave to file it instanter; the court, having examined the Complaint and having examined William Bray under oath, and being satisfied that there is probable cause for filing the Complaint, hereby grants leave to file it instanter.
2) Since defendant, arrested without a warrant or other process, is present in open court, the court takes jurisdiction of his person and orders the Sheriff to take defendant into custody.
3) Defendant was duly arraigned and pleaded not guilty to the offense charged.
4) Defendant waives trial by jury.
5) Trial before the Court without a jury is now had and there is a finding of guilty, and a judgment of guilty is entered upon the finding, and a fine of $50 is assessed against defendant.
6) Judgment for the fine is satisfied that same day by payment of $50 deducted from defendant's cash bond.

OPINION

As a preliminary matter, we note that both defendant and the State on this appeal treat defendant as an indigent person in the trial court as well as on this appeal. Defendant was convicted and sentenced and paid his fine on 31 January 1972. He filed his notice of appeal on 29 February 1972. It was not until 27 April 1972 that defendant petitioned the trial court for the appointment of a named attorney as his appellate counsel and for a

free transcript of proceedings on the grounds of his indigency. His supporting affidavit alleged that his income for the preceding year was $1752.00, that he had no assets, and that his prospective income would consist solely of public assistance payments. The petition was allowed and the named attorney was appointed as defendant's appellate counsel. Hence, the record does not show that defendant ever did petition for an appointed trial counsel on the grounds of indigency. And yet, on this appeal, both parties agree that the issue is one of defendant's right as an indigent to appointed trial counsel and of his right to have been so advised; both parties simply assume that defendant was in fact an indigent person in the trial court. In order to decide the issues presented, we indulge the same assumption.

Defendant's first contention on appeal is that, as an indigent, he had a right to appointed trial counsel under the Sixth Amendment to the United States Constitution (applicable to the States under the Fourteenth Amendment) even though he was actually punished by a fine only, because the offense for which he was tried was also punishable by incarceration so that at trial he was faced with potential incarceration; and that this right to appointed trial counsel had not been knowingly and intelligently waived by him for the simple reason that he had not been advised by the court that he had such a right.

The penalty provision of the statute for violation of which defendant was prosecuted is in relevant part as follows:

> "Penalty.
>
> A person first convicted of theft of property not from the person and not exceeding $150 in value shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both. A person convicted of such theft a second or subsequent time, or after a prior conviction of any type of theft, shall be im-

prisoned in the penitentiary from one to 5 years. * * *" Ill. Rev. Stat. 1969, ch. 38, par. 16-1.[1]

To support his contention, defendant relies on *Argersinger* v. *Hamlin* (June 1972), 407 U.S. 25, 32 L. Ed. 2d 520, 92 S. Ct. 2005, a case in which the defendant-misdemeanant was sentenced to 90 days in jail.[2] But in *Argersinger,* Mr. Justice Douglas speaking for the court, expressly said:

> "We need not consider the requirements of the Sixth Amendment as regards the right to [trial] counsel where loss of liberty is not involved, however, for here petitioner was in fact sentenced to jail." 407 U.S. at 37.

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[1] At the hearing in aggravation and mitigation, the prosecutor informed the court that in 1957 defendant had been convicted of petty theft and sentenced to 30 days in the House of Correction. Therefore, it might appear that defendant, if convicted in the instant case, was facing the enhanced penalty of punishment in the penitentiary. In order to invoke the enhanced penalty, there is no limit on the period of time between the two convictions. *People* v. *Ferrara* (1969), 111 Ill. App. 2d 472, 250 N.E. 2d 530, cert. den. 398 U.S. 927, 26 L. Ed. 2d 89, 90 S. Ct. 1815. But the enhanced penalty may not be imposed unless the first conviction is alleged in the indictment and proved at the trial. *People* v. *Owens* (1967), 37 Ill. 2d 131, 225 N.E.2d 15: *People* v. *Weaver* (1968), 41 Ill. 2d 434, 243 N.E. 2d 245, cert. den. 395 U.S. 959, 23 L. Ed. 2d 746, 89 S. Ct. 2100; *People* v. *Dixon* (1970), 46 Ill. 2d 502, 263 N.E. 2d 876; *People* v. *Ramey* (1974), 22 Ill. App. 3d 916, 317 N.E. 2d 143. In the instant case, the first conviction in 1957 for petty theft was not alleged in the complaint and was not proved at trial. Hence, defendant in the instant case, was not tried for an offense which was punishable by imprisonment in the penitentiary.

[2] *Argersinger* has been held entitled to retroactive application. *People* v. *Morrissey* (1972), 52 Ill. 2d 418, 288 N.E. 2d 397; *People* v. *Coleman* (1972), 52 Ill. 2d 470, 288 N.E. 2d 396.

The court's holding was then expressed as follows:

> "We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." 407 U.S. at 37.

Hence, it is clear that *Argersinger* does not support defendant's contention, and that what defendant is asking us to do is to extend *Argersinger* to his situation in which his punishment was by fine only in an amount less than the cash bail which he had posted. But we have not been cited to, nor have we found, any case in which a State reviewing court has so extended *Argersinger.* On the contrary, this court in *People* v. *Heal* (Second District, 1974), 20 Ill. App. 3d 965, 967-968, 313 N.E. 2d 670 has already declined to do so, holding that in misdemeanor prosecutions generally, where no sentence of confinement is in fact imposed, there is no requirement as a matter of constitutional law that the defendant be represented by trial counsel. In *People* v. *Bailey* (Third District, 1973), 12 Ill. App. 3d 779, 301 N.E. 2d 481, this court expressly found it "unnecessary to decide whether the rule of *Argersinger* should apply to offenses because merely punishable by imprisonment. . . ." Hence, we adhere to the decision in *Heal* and decline to extend the *Argersinger* holding to cases such as the instant case in which defendant was punished by a fine only in an amount less than the amount of the cash bond which defendant had already posted.[3] Hence, we hold that, under

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[3] We are aware that some lower federal courts hold the position for which defendant here contends. Even before *Argersinger* was decided, the Court of Appeals for the Fifth Circuit had gone beyond *Argersinger* to hold the position for which defendant contends, and has adhered to its position after *Argersinger. Harvey* v. *Mississippi* (1965), 340 F. 2d 263; *McDonald* v. *Moore* (1965), 353 F. 2d 106; *Matthews* v. *Florida* (1970), 422 F. 2d 1046; *Olvera* v. *Beto* (1970), 429 F. 2d 131; *Thomas* v. *Savage*

such circumstances, defendant had no constitutional right to an appointed trial counsel.

Defendant's second contention focuses upon a necessary consequence of the *Argersinger* decision which would be eliminated if *Argersinger's* constitutional requirement of an appointed trial counsel were extended to all cases in which the defendant faced potential incarceration. The reference is to what Chief Justice Burger's concurring opinion deemed a necessary predictive pre-trial evaluation by the trial judge (with the assistance of the prosecutor)

> "of each case to determine whether there is a significant likelihood that, if the defendant is convicted, the trial judge will sentence him to a jail term". 407 U.S. at 42.

The opinion of the court put the matter as follows:

> "Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel. He will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts". 407 U.S. at 40.

Defendant contends that this necessary predictive evaluation is itself unconstitutional in State courts under the

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[3] (Continued)

(1975), 513 F. 2d 536. See, however, *Cottle* v. *Wainwright* (1973), 477 F. 2d 269, in which the Fifth Circuit did not adhere to its position in a case in which the convicted misdemeanant had been given a 20-day suspended sentence and there was nothing in the record to show that the defendant had been imprisoned for this conviction. A few Federal District Courts in other circuits have also held the position for which defendant here contends. *Geehring* v. *Municipal Court of Girard* (N.D. Ohio, 1973), 357 F. Supp. 79; *Hernandez* v. *Craven* (C.D. Cal. 1972), 350 F. Supp. 929, 936-937.

due process and equal protection guarantees of the Fourteenth Amendment because, for want of an objective standard by which to make the predictive evaluation, the evaluation will be arbitrary on the part of each individual trial judge with the result that one defendant will be fined only, while another defendant under identical circumstances will be imprisoned. It suffices to say that, even if the same two hypothetical indigent defendants were each given appointed trial counsel as a constitutional right, the same disparity of sentencing could occur after both had been convicted. The same evaluation must be made whether it be done before trial or after trial and conviction. The only difference we can see is that some factors relevant to the evaluation could not be made available for the pretrial predictive evaluation of the trial judge without prejudice to the defendant (e.g., the defendant's prior criminal record). We find no merit in this contention of defendant.

As a related matter, defendant also contends that the predictive evaluation requires the trial court to foreclose itself from using the full range of sentencing options which the legislature intended to have after conviction. We see no merit in this contention either because, in its predictive evaluation, the trial court is actually exercising the full range of its legislatively-afforded sentencing options by discarding some of those options in its search for the most appropriate sentencing alternative.

Defendant's third contention is that he had an Illinois statutory right to appointed counsel which was afforded to him by two specific Illinois statutes, which statutory right was not knowingly and intelligently waived by him for want of any advisement by the court to defendant that defendant had such a statutory right to appointed counsel. The two relevant statutes are Ill. Rev. Stat. 1969, ch. 38, par. 109-1(b)(2) and par. 113-3. In relevant part, par. 109-1(b)(2) is as follows:

"(Preliminary Examination):

(b) The judge shall:

(2) Advise the defendant of his right to counsel and if [defendant is] indigent shall appoint a public defender or licensed attorney at law of this State to represent him in accord with the provisions of Section 113-3 of the Code."

Again, in relevant part, par. 113-3 is as follows:

"(Arraignment):

(a) Every person charged with an offense shall be allowed counsel before pleading to the charge. If the defendant desires counsel and has been unable to obtain same before arraignment, the court shall recess court or continue the cause for a reasonable time to permit defendant to obtain counsel and consult with him before pleading to the charge. If the defendant desires counsel and has been unable to obtain same before arraignment, the court shall recess court or continue the cause for a reasonable time to permit defendant to obtain counsel and consult with him before pleading to the charge.

(b) In all cases, except where the penalty is a fine only, if the court determines that the defendant is indigent and desires counsel, the Public Defender shall be appointed as counsel. * * *"

If we decide that either of the above statutory provisions creates a statutory right to appointed counsel in defendant, then the issue of whether he waived that right knowingly and intelligently will become relevant. On that issue of waiver of a right of counsel, Supreme Court Rule 401(a)(3) (which became effective on 1 September 1970) becomes applicable. Ill. Rev. Stat. 1971, ch. 110A, par. 401(a)(3). The said Supreme Court rule reads as follows:

"(a) Waiver of Counsel. Any waiver of counsel shall be in open court. The court shall not permit a waiver of counsel by a person accused of a crime punishable by imprisonment in the penitentiary without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:

* * *

(3) That he has a right to counsel and, if he is indigent, to have counsel appointed for him by the court."[4]

Defendant advances three specific subcontentions:

(a) In violation of the provisions of paragraph 109-1(b)(2), the judge, as a preliminary hearing judge, neither advised defendant of his right to counsel nor appointed counsel for him as an indigent, in accord with the provisions of par. 113-3:

(b) In violation of par. 113-3(b), the judge, as the arraignment judge, did not appoint the Public Defender to represent him as an indigent before he was required to plead to the charge;

(c) He had not knowingly and intelligently waived his right to counsel because he had not been advised of that right as required by par. 109-1 (b)(2) and by Supreme Court rule 401 (a)(3).

As a preliminary matter in reviewing these three subcontentions, we note that the State has taken the position that the transcript of proceedings on 31 January 1972 does not reflect the fact that there had been any preliminary hearing on that date; if so, of course, par. 109-1 (b)(2) would not be applicable. But the transcript can reasonably be construed as showing that the proceeding

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[4] The phrase "in the penitentiary" was deleted by an amendment effective 1 September 1974. The Committee Comments relating to this amendment state that the amendment was intended to conform the rule to the 1972 *Argersinger* decision.

on that date began as a preliminary hearing on the issue of probable cause to prosecute for the purpose of permitting the complainant to file his complaint instanter. This construction is confirmed by the judgment order of the court entered at the close of that proceeding. The first portion of that judgment order expressly recites that William Bray presents his Complaint under oath and moves the court that he be granted leave to file it instanter; that the court, having examined the Complaint and having examined William Bray under oath, and being satisfied that there is probable cause for filing the Complaint, grants leave to file it instanter. On that state of the record, we find that there was in fact a preliminary hearing on 31 January 1972.

We deal first with defendant's contention that, as an indigent, he had a statutory right to appointed counsel. Defendant first points to Ill. Rev. Stat. 1969, ch. 38, par. 109-1(b)(2) relating to preliminary examination. But the right to appointed counsel referred to therein is a right "in accord with the provisions of Sec. 113-3 of the Code". In *People* v. *Bonner* (1967), 37 Ill. 2d 553, 229 N.E. 2d 527, cert. den. 392 U.S. 910, 20 L. Ed. 2d 1368, 88 S. Ct. 2067, our Supreme Court construed par. 109-1(b)(2) as referring to the right to counsel at arraignment created by par. 113-3, and held that par. 109-1(b)(2) did not create any statutory right to counsel at the preliminary hearing.[5] Hence, the only relevant statute dealing with

[5] In *Bonner*, the defendant was contending that par. 109-1(b)(2) created in him a right to appointed counsel at his preliminary hearing on probable cause to prosecute him for a felony. Employing a policy of strict literal construction, the Supreme Court held that the said statutory provision did not create any such right to appointed counsel at the preliminary hearing, but only at arraignment because of the clause "in accord with the provisions of Sec. 113-3 of this Code". The court also held that the defendant had no *constitutional* right to appointed counsel at his preliminary hearing because the preliminary hearing was not a critical stage in the criminal proceeding.

the creation or existence of a *statutory* right to appointed counsel in an indigent defendant is par. 113-3(b) dealing with the existence of a right to appointed counsel at or prior to arraignment (and presumably thereafter at trial), with the appointment to be made by the arraignment judge or, upon earlier application and a showing of indigency, by the preliminary hearing judge.

Turning, then, to par. 113-3(b), we see immediately that the instant defendant faces a problem in demonstrating that the paragraph is applicable to him, owing to the express exception from "all cases" of cases "where the penalty is a fine only". In an attempt to meet that problem, defendant contends that the exception should be construed to read "except where the offense is punishable by a fine only". This is the narrow critical issue as to the existence of a right to appointed counsel in the instant indigent defendant. Defendant purports to find some support for his suggested construction in *People* v. *Bailey, supra,* where the court said:

> "Although we do not decide the issue in this case, it seems to us that based on practical and legal

[5] (Continued)
This latter holding was subsequently overruled by the decision of the United States Supreme Court in *Coleman* v. *Alabama* (1970), 399 U.S. 1, 26 L. Ed. 387, 90 S. Ct. 1999. Hence, an indigent defendant being prosecuted for a felony now has a constitutional right to appointed counsel at his preliminary hearing. *People* v. *Adams* (1970), 46 Ill. 2d 200, 263 N.E. 2d 490, aff'd. sub. nom. *Adams* v. *Illinois*, 405 U.S. 278, 31 L. Ed. 2d 202, 92 S. Ct. 916. But the instant defendant was being prosecuted for a misdemeanor and, upon conviction, was then in fact sentenced to the payment of a small fine only. Since we have already declined herein to extend *Argersinger* to cover that situation even in respect of the defendant's right to trial counsel, it follows *a fortiori* that we must decline to extend *Argersinger* to create a constitutional right in the instant indigent defendant to appointed counsel at the preliminary examination.

consideration, the better policy in misdemeanor cases would be for the court to comply with Supreme Court Rule 402 [Ill. Rev. Stat. 1973, ch. 110A, par. 402], where the offense charged is punishable by imprisonment." 12 Ill. App. 3d at 782.

But we can see no persuasive analogy whatever between the above-quoted language and the proper construction of the language of the statutory exception here involved.

On the other hand, the State, in urging a strict literal construction of the language of that statutory exception, relies on *People* v. *Dupree* (1969), 42 Ill. 2d 249, 246 N.E. 2d 285. But *Dupree* does not deal with the statutory exception at all. It is, however, a case manifesting a policy of strict literal construction of par. 113-3. In order, therefore, to implement that policy of strict construction, we hold that the language of the express exception in par. 113-3(b) must be read literally and cannot be given the construction sought by defendant. Hence, we hold that defendant as an indigent had no statutory right to appointed counsel at arraignment because his penalty was a fine only so that he fell within the express exception in par. 113-3(b).

Since we have concluded that defendant as an indigent had neither a statutory nor a constitutional right to appointed counsel either at his preliminary hearing or at his arraignment or at his trial, it is unnecessary for us to consider whether or not he waived any such right.

For the foregoing reasons, we affirm the judgment of the trial court.

Judgment Affirmed.

STAMOS, P.J., concurs.

LEIGHTON, J., dissents:

I believe that the right of an accused to be told he can have counsel to assist him in his defense, and if he is indigent, that one will be appointed for him, is so important that judges should not engage in nice calculations about when that right should be enjoyed. Compare *Glasser* v. *United States* (1942), 315 U.S. 60, 86 L. Ed. 680, 62 S. Ct. 457, 467; *People* v. *Noble*, 42 Ill. 2d 425, 248 N.E. 2d 96.

In this case, defendant appeared in the trial court for a preliminary hearing on a theft charge. By the laws of this state, the judge was required to tell him that he had the right to counsel. (Ill. Rev. Stat. 1971, ch. 38, par. 109-1 (b)(2); Supreme Court Rule 401, Ill. Rev. Stat. 1971, ch. 110A, par. 401. It has been held that this right exists whether or not the accused is indigent. See *People* v. *Manikas*, 87 Ill. App. 2d 227, 230 N.E. 2d 577; compare *Alexander* v. *City of Anchorage* (Alaska 171) 490 P. 2d 910. Furthermore, it is the law of this state that if an accused, without being advised of his right to counsel, is subjected to a trial for which he can be incarcerated, the judgment entered in that proceeding will be set aside. *People* v. *Fletcher*, 74 Ill. App. 2d 387, 220 N.E. 2d 70 (abst.); compare *People* v. *McKenzie*, 89 Ill. App. 2d 157, 231 N.E. 2d 702.

The record before us clearly shows that although defendant was in court for a preliminary hearing and then went to trial, he was not advised of his right to counsel. Defendant was charged with theft, an offense not punishable by fine only, (Ill. Rev. Stat. 1971, ch. 38, par. 16-1) and the state concedes that he was an indigent person when he appeared in the trial court. Accordingly, he should have been advised of his right to counsel.

For these reasons, I vote to reverse this judgment and remand it for a new trial in which the defendant's right to counsel will be preserved and protected. Therefore, I respectfully dissent.

REPORT OF TRIAL PROCEEDINGS

IN THE MUNICIPAL COURT OF CHICAGO
First Municipal District

THE CIRCUIT COURT, COOK COUNTY, ILLINOIS
THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff

vs.

AUBREY SCOTT,
Defendant

No. 72MC 839456

REPORT OF PROCEEDINGS at the hearing of the above-entitled cause before the Honorable Maurice W. Lee, one of the Judges of the said Court, on the 31st day of January, 1972.

Appearances:
Hon. Edward V. Hanrahan
State's Attorney, by
Mr. Sam Grossman,
Assistant State's Attorney,
appeared on behalf of the People

The Clerk: Sheet 1, Line 24; Aubrey Scott; William Bray.
The Court: Who are you?
Mr. Scott: Scott.
The Court: You are charged with the offense of theft.
Mr. Scott: Well, your Honor, that isn't true.
The Court: I said you are charged with it.
My next inquiry is are you going to be ready for trial?
Mr. Scott: Am I ready?
The Court: Yes.
Mr. Scott: I am ready for trial.
The Court: Is the State ready?
Mr. Grossman: State is ready.
The Court: Arraign the defendant, please.
The Clerk: You are charged with the offense of theft. Are you ready for trial?

Mr. Scott: Yes, I am.
The Clerk: How do you plead to the charge?
Mr. Scott: Not guilty.
The Clerk: Do you want to be tried by this Court or before a jury?
Mr. Scott: Well, it doesn't matter. Right here will be okay with me.
(Witnesses sworn)
The Court: Has he got something that will expedite the case, Mr. Grossman?
Show it to him.
Nothing he offered so far?
Mr. Grossman: That is all evidence of something that happened.

WILLIAM BRAY, called as a witness on behalf of the People of the State of Illinois, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Grossman

Q. For the record, what is your name?
A. William Bray.
Q. Where are you employed?
A. S. W. Woolworth, 211 South State; Security Guard.
Q. Calling your attention to the 19th of January '71, at S. W. Woolworth in the City of Chicago, were you on duty?
A. Yes.
Q. Did you have occasion to see one Aubrey Scott, and I indicate the defendant on the right, for the record?
A. Yes, I did.
Q. Where did you see him?
A. Mr. Scott approached one of the sales girls and asked her to unlock some of the attache cases we have locked up. She did so, and Mr. Scott walked around the store fifteen or twenty minutes, I [illegible], with a ten dollar bill in his hand, and by the sales girls, back and forth, and kept walking around and picked up an address book and put it in his pocket.

And then, after watching Mr. Scott another five minutes, I walked out on State Street, and a few minutes later, Mr. Scott walked out with the attache case.

Q. What time of day was it?

A. I believe it was about six in the afternoon.

Q. What did you do when you saw him with the case?

A. I identified myself and ordered Mr. Scott to go back into the store.

Q. And did you ask him if he had a receipt for it?

A. Mr. Scott said it belonged to him.

Mr. Scott had put a number of articles, including the one he has here, inside of the case prior to walking out of the store.

Q. Is this the case you saw him with (indicating)?

A. Yes.

Q. Whose property is it?

A. S. W. Woolworth.

Q. What is the value of the case?

A. I believe there is a tag which would indicate the value as twelve ninety-nine.

Q. All that took place in the City of Chicago, County of Cook, State of Illinois?

A. Yes.

Mr. Grossman: State offers this as People's Exhibit 1.

(Witness excused)

The Court: People rest?

Mr. Grossman: People rest.

The Court: What do you wish to say?

Mr. Scott: I had taken my things out to put in there to see if it would fit, and then I walked around looking for the girl, which I couldn't find, and I am partially blind and I was constantly looking for her. And all of a sudden, I don't know where he come from, he grabbed me by the wrist and says, "You are a shoplifter."

I said "I know I came to buy a case," and I showed him I had money to buy what I want. And so I showed him I had money to buy. And then some other fellow who does the same type of work, he was behind and pushed me and grabbed me by the hand and tell me, "I should take you down and beat your so-and-so."

And I said, "For what? I haven't done anything. I had money to pay for whatever I am buying."

So then the police come and put my arms behind me and handcuffed me and took me to jail.

And naturally I wouldn't buy the briefcase. I had to find out whether it fit my articles. That was the point in putting my articles in it. After it fit, I said, "Good. That is what I like." And I went to look for the girl.

Mr. Grossman: We will rest on the State's case.

The Court: There's a lot of questions I want to know.

Mr. Grossman: Ask them.

The Court: Why don't you ask them? Are you going to leave it right there?

Mr. Grossman: We feel we have made our case.

The Court: Where did he get stopped?

Mr. Grossman: He testified he was coming out of the store.

The Court: He indicates he got stopped in the store. He indicates that he wanted to try it out for size; indicated he had money. Next question is how much money. What did he do with the money? Did he ever offer money to anybody? Did he ever see a sales clerk?

Mr. Scott: I had almost $300 in my pocket. I was looking for the girl because she didn't have what you would call a counter that you work behind. She stands out near the counter, and I didn't see her.

The Court: Where did you get arrested, sir?

Mr. Scott: Where was I? Inside of the store.

The Court: You weren't on State Street?

Mr. Scott: On State Street? Inside of the store.

The Court: But you weren't on the street?

Mr. Scott: No. I didn't go out on the street.

The Court: When you were arrested?

Mr. Scott: When this man come in the door—I am inside. He comes in the door and grabs me by my wrist like this (indicating), and said, "You are a shoplifter."

I said, "I am not. I am looking for the sales girl."

The Court: He said he observed you a long time walking around the store with a ten dollar bill in your hand.

Mr. Scott: I was looking for the girl.
The Court: What were you going to buy?
Mr. Scott: I was going to pay the girl.
The Court: What were you going to buy with the ten dollar bill?
Mr. Scott: More, if she said it. I had it to pay.
The Court: I don't believe you, sir. Finding of guilt. What do you have in aggravation?
The Court Sergeant: Most recently, it is 1957.
The Court: What?
The Court Sergeant: Thirty days, House of Correction, petty larceny, Judge Slater.
Mr. Scott: That's been 13 years, and I promised I would never go back to no jail, and I was not guilty of trying to make a theft.
Mr. Grossman: We recommend probation.
The Court: Fifty and no costs.

(whiich was all of the testimony given and proceedings had in the above entitled cause in Branch 41 of the Municipal Division of the Circuit Court of Cook County, on January 31, 1972.)